

## Message Text

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ACTION EB-08

INFO OCT-01 EUR-12 ISO-00 FEA-01 ERDA-05 AID-05 CEA-01  
CIAE-00 COME-00 DODE-00 FPC-01 H-01 INR-07 INT-05  
L-03 NSAE-00 NSC-05 OMB-01 PM-04 USIA-06 OES-06 SP-02  
SS-15 STR-04 TRSE-00 ACDA-07 PA-01 PRS-01 ITC-01  
JUSE-00 /103 W

-----040416Z 012202 /73

P 032055Z MAR 77

FM AMEMBASSY OTTAWA

TO SECSTATE WASHDC PRIORITY 2652

INFO AMCONSUL MONTREAL

ALL CONSULATES IN CANADA (BY POUCH)

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E.O. 11652: N/A

TAGS: ENRG, SENV, PGOV, CA

SUBJECT: ENERGY - LEGAL FRAMEWORK FOR GAS PIPELINE  
DECISION

DEPARTMENT FOR EB AND L

PASS WHITE HOUSE/SCHLESINGER, FEA AND FPC

REF: OTTAWA 554

1. EMBASSY ANTICIPATES THAT, AS WE PROGRESS TOWARD  
DECISION ON PIPELINE ROUTE TO BRING ALASKAN GAS TO  
MARKET, QUESTIONS WILL BE RAISED ABOUT HOW CANADIAN  
CONSTITUTIONAL AND LEGAL FRAMEWORK WILL IMPACT ON  
DECISION, INCLUDING THE POSSIBILITY OF COURT CHALLENGES  
WHICH COULD DELAY DECISION OR ITS IMPLEMENTATION.  
SENATOR STEVENS OF ALASKA HAS, OF COURSE, ALREADY RAISED  
SOME QUESTIONS (SEE REFTEL). EMBASSY RECOMMENDS THAT  
WASHINGTON AGENCIES DRAW UP LIST OF QUESTIONS FOR  
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DISCUSSION WITH CANADIAN PIPELINE COORDINATOR, WHEN  
NAMED, WITH VIEW TO OBTAINING DEFINITIVE ANSWERS FROM  
GOC FOR USE AS NECESSARY. PARAGRAPH 2 BELOW CONTAINS  
EMBASSY'S PRELIMINARY LIST OF POSSIBLE QUESTIONS.

2. A. WHAT IS LEGAL AUTHORITY OF NATIONAL  
ENERGY BOARD (NEB) TO GRANT AUTHORIZATION FOR

CONSTRUCTION OF NATURAL GAS PIPELINES?

B. IS LEGISLATION GRANTING AUTHORITY TO NEB IN CONNECTION WITH GOVERNMENT APPROVAL OKF PIPELINE DECISION SUBJECT TO CONSTITUTIONAL CHALLENGE BY (1) PROVINCIAL GOVERNMENTS OR (2) PRIVATE PERSONS OR GROUPS?

C. WHAT IS AUTHORITY OF GOVERNOR IN COUNCIL WITH RESPECT TO AUTHORIZATION OF GAS PIPELINE PROJECTS? CAN CABINET APPROVE PROJECTS SUBJECT TO CONDITIONS WHICH ARE ADDITIONAL TO THOSE SPECIFIED BY NEB? CAN CABINET APPROVE PROJECTS OTHER THAN THOSE CERTIFIED BY NEB?

D. ARE DECISIONS OF NEB AND/OR CABINET TAKEN IN ACCORDANCE WITH THEIR RESPECTIVE AUTHORITY SUBJECT TO JUDICIAL REVIEW AS TO FACT AS WELL AS TO LAW? WHO CAN APPEAL? WHAT POWERS OF REDRESS DO THE COURTS POSSESS?

E. IN EVENT THAT CABINET APPROVES RECOMMENDATION BY NEB IN FAVOR OF ONE OF PROPOSED PIPELINES, WITH CONDITIONS PLACED ON CONSTRUCTION WHICH REFLECT ITS OWN, NEB'S, OR JUSTICE BERGER'S VIEWS REGARDING ENVIRONMENTAL OR SOCIAL STANDARDS, CAN OTHER GOVERNMENT JURISDICTIONS OR PERSONS MOVE TO BLOCK CONSTRUCTION OF PROJECT IF THEY CLAIM THEY HAVE EVIDENCE THAT STIPULATED CONDITIONS WILL NOT BE MET?

F. AFTER CONSTRUCTION BEGINS, CAN IT BE DELAYED BY LIMITED OFFICIAL USE

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LEGAL ACTION BASED ON CLAIMS THAT STIPULATED CONDITIONS ARE NOT BEING MET AS WORK PROGRESSES?

G. IS THERE POTENTIAL LEGAL CONFLICT BETWEEN NEB AND DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS (DINA) REGARDING JURISDICTION OVER CONSTRUCTION OF PIPELINE IN REGIONS ABOVE 60TH PARALLEL? THAT IS, COULD SITUATION ARISE WHEREIN PIPELINE OPPONENTS MIGHT CLAIM THAT LEGISLATION GRANTING DINA SOLE LINE OPERATING AUTHORITY NORTH OF 60 DEGREES OVERRIDES LEGAL AUTHORITY OF NEB TO AUTHORIZE CONSTRUCTION OF PIPELINE IN DINA'S JURISDICTION AND USE THIS CLAIM AS BASIS OF LEGAL ACTION TO DELAY INITIAL APPROVAL OR FINAL CONSTRUCTION OF PIPELINE?

H. IS IT POSSIBLE FOR PROVINCIAL GOVERNMENT (E.G., BRITISH COLUMBIA OR ALBERTA) TO RAISE LEGAL OBSTACLES TO CONSTRUCTION OF PIPELINE THROUGH ITS TERRITORY AFTER PROJECT HAS BEEN APPROVED BY FEDERAL GOVERNMENT?

I. IN EVENT OF SIGNIFICANT DEVOLUTION OF POWER TO TERRITORIAL GOVERNMENTS, PERHAPS IN CONNECTION WITH POLITICAL PROVISIONS OF SETTLEMENT OF NATIVE CLAIMS, COULD SUCCESSOR GOVERNMENTS IN YUKON AND NWT RAISE LEGAL OBSTACLES TO PIPELINE CONSTRUCTION AFTER PROJECT HAS BEEN APPROVED BY FEDERAL GOVERNMENT?

J. COULD PRESENTLY UNSETTLED LEGAL STATUS OF NON-TREATY NATIVES AND INDIANS IN CANADA RAISE CONSTITUTIONAL QUESTIONS REGARDING AUTHORITY OF GOC TO APPROVE CONSTRUCTION OF PIPELINE THROUGH LANDS THEY CLAIM?

K. WOULD LEGISLATION PROVIDING FOR FINANCIAL GUARANTEES

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BY GOC BE SEPARATE FROM LEGISLATION APPROVING CONSTRUCTION OF PIPELINE PROJECT, THUS POSSIBLY DELAYING EFFECTIVE APPROVAL OF PROJECT BY GOC?

L. WOULD LEGISLATION ALLOWING GOVERNMENT TO GRANT FINANCIAL GUARANTEES, WHETHER SEPARATE FROM OR INTEGRAL TO AUTHORIZATION OF PIPELINE, BE SUBJECT TO CONSTITUTIONAL OR OTHER LEGAL CHALLENGE?

M. WILL TARIFFS FOR PROPOSED PIPELINE PROJECTS BE SUBJECT TO APPROVAL BY OTHER AUTHORITIES THAN NEB?

N. ARE TARIFFS APPROVED BY GOC OR OTHER JURISDICTIONS  
SUBJECT TO JUDICIAL REVIEW OR APPEAL?

O. IS ENABLING LEGISLATION REQUIRED TO MAKE PIPELINE  
TREATY BINDING IN PROVINCES? DOES TREATY ONLY REFLECT  
EXISTING LEGAL SITUATION, OR DOES IT IMPOSE NEW  
CONSTRAINTS ON PROVINCIAL AS WELL AS FEDERAL ACTION?  
CAN PROVINCES ENTER INTO PROTOCOLS TO TREATY CONFIRMING  
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ITS PROVISIONS? WHO WOULD BE NEGOTIATING AND SIGNATORY  
PARTIES TO SUCH PROTOCOLS?

3. ACTION REQUESTED: RESPONSIBLE AGENCIES TO DRAW UP  
COMPREHENSIVE LIST OF QUESTIONS. IT WOULD BE HELPFUL  
TO HAVE LIST IN HAND BY TIME CANADIAN COORDINATOR IS  
NAMED WHICH COULD BE WITHIN 10 DAYS. ENDERS

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## Message Attributes

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